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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1936

No. 138

KENTUCKY WHIP AND COLLAR COMPANY,
PETITIONER,

vs.

ILLINOIS CENTRAL RAILROAD COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR CERTIORARI FILED JUNE 26, 1936.

CERTIORARI GRANTED OCTOBER 12, 1936.

SUPREME COURT OF THE UNITED STATES

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[fol. 1] [Caption omitted]

IN UNITED STATES DISTRICT COURT, WESTERN DISTRICT OF KENTUCKY

KENTUCKY WHIP & COLLAR COMPANY, Plaintiff,

vs.

ILLINOIS CENTRAL RAILROAD COMPANY, Defendant

BILL IN EQUITY AND PETITION FOR A DECLARATION OF RIGHTS —Filed August 17, 1935

1

The plaintiff, Kentucky Whip & Collar Company, states that it is a corporation organized under the laws of the Commonwealth of Kentucky, and as such corporation it is a citizen of Kentucky, with its principal office and its place of residence at Eddyville, in the Western District of Kentucky, and as such corporation it is authorized to sue and be sued, contract and be contracted with, in its corporate name. Plaintiff is now and for many years past has been engaged in the manufacture at Eddyville, Kentucky, of horse collars and strap goods and in the marketing of such manufactured articles throughout the United States, and in the manufacture of said articles it now employs and for many years past has employed the labor of convicts confined in the Kentucky State Penitentiary at Eddyville, Kentucky.

2

The defendant, Illinois Central Railroad Company, is a corporation organized under the laws of the State of Illinois, and is a citizen of that State. As such corpora-
[fol. 2] tion it is authorized to and does engage in the business of a common carrier by rail, and as such common carrier it has a line of railroad to and through the town of Eddyville, in the Western District of Kentucky, and to and through other places in the Western District of Kentucky, with agents in charge of the defendant's business at each of such towns.

3

This is a suit in equity of a civil nature, arising under the Constitution and laws of the United States, as will be

hereinafter more fully set out, and it presents and involves an actual controversy between this plaintiff and the defendant, and the matter in controversy, exclusive of interest and costs, exceeds the sum or value of $3,000.00.

4

Plaintiff states that in the conduct of its business it has built up a large and valuable trade for the products manufactured by it in practically all the States of the Union, and particularly in the States of Arizona, Illinois, Michigan, Nebraska, North Carolina, Kansas, Ohio, Texas, Virginia, Pennsylvania, Alabama, Iowa, Indiana, Georgia, Minnesota, Wisconsin, Louisiana, Mississippi, Missouri, Arkansas, Oklahoma, South Carolina, Tennessee, West Virginia and Maryland; and that said business, particularly the right to ship its articles in interstate commerce to the States hereinabove enumerated, is worth far in excess of $3,000.00. It states that the collars, strap goods and other articles manufactured by it, and sold and shipped in interstate commerce, are useful articles of commerce and are not in any particular whatever harmful to health, or to the peace, good order or general welfare of the communities into which they are shipped or in which they are used.

5

Heretofore the Congress of the United States passed, and on July 24, 1935, the President of the United States approved an act entitled: "An Act to prohibit the interstate transportation of prison-made products in certain cases," said Act being in words and figures as follows:

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assem-
[fol. 3] bled, That it shall be unlawful for any person knowingly to transport or cause to be transported, in any manner or by any means whatsoever, or aid or assist in obtaining transportation for or in transporting any goods, wares, and merchandise manufactured, produced, or mined wholly or in part by convicts or prisoners (except convicts or prisoners on parole or probation), or in any penal or reformatory institution, from one State, Territory, Puerto Rico, Virgin Islands or District of the United States, or place non-contiguous but subject to the jurisdiction thereof, or from any foreign country, into any State, Territory,

Puerto Rico, Virgin Islands, or District of the United States or place non-contiguous but subject to the jurisdiction thereof, where said goods, wares and merchandise are intended by any person interested therein to be received, possessed, sold, or in any manner used, either in the original package or otherwise in violation of any law of such State, Territory, Puerto Rico, Virgin Islands, or District of the United States, or place non-contiguous but subject to the jurisdiction thereof. Nothing herein shall apply to commodities manufactured in Federal penal and correctional institutions for use by the Federal Government.

Sec. 2. All packages containing any goods, wares, and merchandise manufactured, produced, or mined wholly or in part by convicts or prisoners, except convicts or prisoners on parole or probation, or in any penal or reformatory institution, when shipped or transported in interstate or foreign commerce shall be plainly and clearly marked, so that the name and address of the shipper, the name and address of the consignee, the nature of the contents, and the name and location of the penal or reformatory institution where produced wholly or in part may be readily ascertained on an inspection of the outside of such package.

Sec. 3. Any person violating any provision of this Act shall for each offense, upon conviction thereof, be punished by a fine of not more than $1,000, and such goods, wares, and merchandise shall be forfeited to the United States, and may be seized and condemned by like proceedings as those provided by law for the seizure and forfeiture of property imported into the United States contrary to law.

Sec. 4. Any violation of this Act shall be prosecuted in any court having jurisdiction of crime within the district [fol. 4] in which said violation was committed, or from, or into which any such goods, wares, or merchandise may have been carried or transported, or in any Territory, Puerto Rico, Virgin Islands, or the District of Columbia, contrary to the provisions of this Act."

Plaintiff states that said Act is violative of the Constitution of the United States in the following particulars:

(a) It is not a valid exercise of the power conferred upon Congress by the Constitution of the United States by Clause 3 of Section 8 of Article 1 of the Constitution of the

United States to regulate commerce with foreign nations, and among the several States, and with the Indian tribes, but on the contrary is an unconstitutional attempt on the part of Congress to prohibit, regulate and interfere with the purely local business of manufacturing and producing harmless articles of commerce.

(b) It is an unconstitutional attempt on the part of Congress to deal with matters reserved to the states and to the people by the Tenth Amendment to the Constitution of the United States.

(c) It is violative of the Fifth Amendment to the Constitution of the United States, in that it deprives the plaintiff of its property, including its right to do busness in interstate commerce, without due process of law.

(d) It is an unconstitutional attempt on the part of Congress to so exercise its power to regulate interstate commerce as to permit the respective States of the Union, under the protection of said Act, to prohibit and regulate interstate transactions between their inhabitants and the inhabitants of other States with reference to useful and harmless articles of commerce.

6

Plaintiff states that believing the said Act to be unconstitutional, it did, on August 13, 1935, in fulfillment of a bona fide order theretofore received, tender to the defendant, Illinois Central Railroad Company, at its station in Eddyville, Kentucky, one sack of leather horse collars manufactured at plaintiff's plant at Eddyville, Kentucky with prison labor and consigned to C. K. Sutherland at Ajo, in the State of Arizona, and requested said defendant company in consideration of its regularly published tariff charges, to accept said shipment for transportation to its [fol. 5] destination, said tendered shipment being evidenced by a uniform straight bill of lading of the Illinois Central Railroad Company. At the time said shipment was tendered to the defendant railroad company, there was in force and effect in the State of Arizona a law of that State prohibiting the sale within the borders of that State of any goods or merchandise manufactured, produced or prepared wholly or in part by convicts or convict labor, other than by

convicts or prisoners on parole or probation; and by reason of this fact the defendant company, conceiving that under the Act of July 24, 1935, it could not legally transport or cause to be transported said shipment into the State of Arizona, wrongfully and in violation of this plaintiff's rights refused to accept said shipment and to transport same, and, as evidence of its refusal, endorsed upon said bill of lading the following words: "Shipment refused because prohibited by Act of Congress approved July 24, 1935." Said bill of lading, with the endorsement of the defendant's agent thereon, is filed herewith as part hereof, marked Exhibit "A."

7

Plaintiff states that on August 13, 1935, in fulfillment of a bona fide order theretofore received, it tendered to the defendant, Illinois Central Railroad Company, at its station in Eddyville, Kentucky, four sacks of cloth horse collars, manufactured at the plaintiff's plant at Eddyville, Kentucky, with prison labor and consigned to H. E. Dusman at York, in the state of Pennsylvania and requested the said defendant company, in consideration of its regularly published tariff charges, to accept said shipment for transportation to its destination, said tendered shipment being evidenced by a uniform straight bill of lading of the Illinois Central Railroad Company. At the time said shipment was tendered to the defendant railroad company, there was in force and effect in the State of Pennsylvania a law of that State, prohibiting the sale within the borders thereof of any goods or merchandise manufactured, produced or prepared wholly or in part by convicts or prisoners of other States, except convicts or prisoners on parole or probation; and by reason of this fact the defendant company, conceiving that under the Act of July 24, 1935, it could not legally transport or cause to be transported said shipment into the State of Pennsylvania, wrongfully and in violation of this plaintiff's rights refused to accept said [fol. 6] shipment and to transport same, and, as evidence of its refusal, endorsed upon said bill of lading the following words: "Shipment refused because prohibited by Act of Congress approved July 24, 1935." Said bill of lading, with the aforesaid endorsement thereon, is filed herewith as part hereof, marked Exhibit "B."

8

On August 13, 1935, the plaintiff, in fulfillment of a bona fide order theretofore received, tendered to the defendant, Illinois Central Railroad Company, at its station in Eddyville, Kentucky, two sacks of leather horse collars and one sack of cloth horse collars, manufactured at plaintiff's plant at Eddyville, Kentucky, with prison labor, and consigned to Asheville Army Store, at Asheville, in the State of North Carolina, and requested said defendant, in consideration of its regularly published tariff charges, to accept said shipment for transportation to its destination, said tendered shipment being evidenced by a uniform straight bill of lading of the Illinois Central Railroad Company. At the time said shipment was tendered to the defendant railroad company there was in force and effect in the State of North Carolina a law of that State, prohibiting the sale within the borders thereof of any goods or merchandise, other than farm products, coal and chert, manufactured, produced or prepared wholly or in part by convicts or prisoners, except by convicts or prisoners on parole or probation; and by reason of this fact the defendant company, conceiving that under the Act of July 24, 1935, it could not legally transport or cause to be transported said shipment into the State of North Carolina, wrongfully and in violation of this plaintiff's rights refused to accept said shipment and to transport same, and, as evidence of its refusal, endorsed upon said bill of lading the following words: "Shipment refused because prohibited by Act of Congress approved July 24, 1934." Said bill of lading, with the aforesaid endorsement thereon, is filed herewith as part hereof, marked Exhibit "C."

9

On August 13, 1935, in fulfillment of a bona fide order theretofore received, the plaintiff tendered to the defendant, Illinois Central Railroad Company, at its station in Eddyville, Kentucky, three sacks of cloth horse collars, [fol. 7] manufactured at plaintiff's plant at Eddyville, Kentucky, with prison labor and consigned to Kerth-Mangold Hardware Company at Anna, in the state of Illinois, and requested the defendant company, in consideration of its regularly published tariff charges, to accept said ship-

ment for transportation to its destination, said tendered shipment being evidenced by a uniform straight bill of lading of the Illinois Central Railroad Company. At the time said shipment was tendered to the defendant railroad company there was in force and effect in the State of Illinois a law of that State, prohibiting the sale or the offering for sale within that State of any goods or merchandise, other than agricultural limestone produced in the penal and reformatory institutions of that State, manufactured, produced or prepared by convicts or prisoners of other States, other than by convicts or prisoners on parole or probation; and by reason of this fact the defendant company, conceiving that under the Act of July 24, 1935, it could not legally transport or cause to be transported said shipment into the State of Illinois, wrongfully and in violation of this plaintiff's rights refused to accept said shipment and to transport same, and, as evidence of its refusal, endorsed upon said bill of lading the following words: "Shipment refused because prohibited by Act of Congress approved July 24, 1935." Said bill of lading, with the aforesaid endorsement thereon, is filed herewith as part hereof, marked Exhibit "D."

10

On August 13, 1935, in fulfillment of a bona fide order theretofore received, the plaintiff tendered to the defendant, Illinois Central Railroad Company, at its station in Eddyville, Kentucky, two sacks of cloth horse collars, manufactured at plaintiff's plant at Eddyville, Kentucky, with prison labor and consigned to Clyde C. Smith at Ashland, in the State of Ohio, and requested the defendant company, in consideration of its regularly published tariff charges, to accept said shipment for transportation to its destination, said tendered shipment being evidenced by a uniform straight bill of lading of the Illinois Central Railroad Company. At the time said shipment was tendered to the defendant railroad company there was in force and effect in the State of Ohio a law of that State, prohibiting the sale within the borders of that State of any goods or merchandise manufactured, produced or prepared wholly or in part by convicts or convict [fol. 8] labor of other States, other than by convicts or prisoners on parole or probation; and by reason of this fact the defendant company, conceiving that under the

Act of July 24, 1935, it could not legally transport or cause to be transported said shipment into the State of Ohio, wrongfully and in violation of this plaintiff's rights refused to accept said shipment and to transport same, and evidenced its refusal by endorsing on said bill of lading the following words: "Shipment refused because prohibited by Act of Congress approved July 24, 1935." Said bill of lading, with the endorsement of defendant's agent thereon, is filed herewith as part hereof, marked Exhibit "E."

11

On August 13, 1935, in fulfillment of a bona fide order theretofore received, the plaintiff tendered to the defendant, Illinois Central Railroad Company, at its station in Eddyville, Kentucky, two sacks of cloth horse collars, manufactured at plaintiff's plant at Eddyville, Kentucky, with prison labor and consigned to L. S. Crandall at Kingman, in the State of Kansas, and requested the defendant company, in consideration of its regularly published tariff charges, to accept said shipment for transportation to its destination, said tendered shipment being evidenced by a uniform straight bill of lading of the Illinois Central Railroad Company. At the time said shipment was tendered to the defendant railroad company there was in force and effect in the State of Kansas a law of that State prohibiting, with certain exceptions not here material, the sale within the borders of that State of any goods or merchandise manufactured, produced or prepared wholly or in part by convicts or convict labor, other than by convicts or prisoners on parole or probation; and by reason of this fact the defendant company, conceiving that under the Act of July 24, 1935, it could not legally transport or cause to be transported said shipment into the State of Kansas, wrongfully and in violation of this plaintiff's rights refused to accept said shipment and to transport the same, and, as evidence of its refusal, endorsed upon said bill of lading the following words: "Shipment refused because prohibited by Act of Congress approved July 24, 1935." Said bill of lading, with the aforesaid endorsement thereon, is filed herewith as part hereof, marked Exhibit "F."

[fol. 9]

12

On August 13, 1935, in fulfillment of a bona fide order theretofore received, the plaintiff tendered to the defendant, Illinois Central Railroad Company, at its station in Eddyville, Kentucky, eight sacks of cloth horse collars and one box of harness, manufactured at the plaintiff's plant at Eddyville, Kentucky, with prison labor and consigned to Arch C. Ellis at McKinney, in the state of Texas, and requested the defendant company, in consideration of its regularly published tariff charges, to accept said shipment for transportation to its destination, said tendered shipment being evidenced by a uniform straight bill of lading of the Illinois Central Railroad Company. At the time said shipment was tendered to the defendant railroad company there was in force and effect in the State of Texas a law of that State, prohibiting the sale within the borders thereof of goods and merchandise manufactured, prepared or produced by convicts or convict labor, other than by convicts or prisoners on parole or probation; and by reason of this fact the defendant company, conceiving that under the Act of July 24, 1935, it could not legally transport or cause to be transported said shipment into the State of Texas, wrongfully and in violation of this plaintiff's rights refused to accept said shipment and to transport same, and, as evidence of its refusal, endorsed upon said bill of lading the following words: "Shipment refused because prohibited by Act of Congress approved July 24, 1935." Said bill of lading, with the aforesaid endorsement thereon, is filed herewith as part hereof, marked Exhibit "G."

13

On August 13, 1935, in fulfillment of a bona fide order theretofore received, plaintiff tendered to the defendant, Illinois Central Railroad Company, at its station in Eddyville, Kentucky, three sacks of cloth horse collars and one sack of leather horse collars, manufactured at plaintiff's plant at Eddyville, Kentucky, with prison labor and consigned to Paul Hessler at Falls City, in the State of Nebraska and requested the defendant company, in consideration of its regularly published tariff charges, to accept said shipment for transportation to its destination, said tendered shipment being evidenced by a uniform straight bill

of lading of the Illinois Central Railroad Company. At the time said shipment was tendered to the defendant rail-
[fol. 10] road company, the plaintiff is informed there was in force and effect in the State of Nebraska a law of that State, prohibiting the sale therein of any goods or merchandise, other than farm supplies, machinery and equipment, manufactured, produced or prepared wholly or in part by convicts or convict labor, other than by convicts or prisoners on parole or probation; and by reason of this fact the defendant company, conceiving that under the Act of July 24, 1935, it could not legally transport or cause to be transported said shipment into the State of Nebraska, wrongfully and in violation of plaintiff's rights refused to accept said shipment and to transport same, and, as evidence of its refusal, endorsed upon said bill of lading the following words: "Shipment refused because prohibited by Act of Congress approved July 24, 1935." Said bill of lading, with the aforesaid endorsement thereon, is filed herewith as part hereof, marked Exhibit "H."

14

On August 13, 1935, in fulfillment of a bona fide order theretofore received, plaintiff tendered to the defendant company at its station in Eddyville, Kentucky, two boxes of harness and eleven sacks of leather horse collars, manufactured at plaintiff's plant at Eddyville, Kentucky, with prison lab : and consigned to Hill Hardware Corporation, at Amherst in the State of Virginia, and requested the defendant company, in consideration of its regularly published tariff charges, to accept said shipment for transportation to its destination, said tendered shipment being evidenced by a uniform straight bill of lading of the Illinois Central Railroad Company. At the time said shipment was tendered to the defendant railroad company plaintiff is informed and believes that there was in force and effect in the State of Virginia a law of that State, prohibiting the sale of prison or convict-made or produced goods or merchandise, unless made or produced in the State of Virginia; and by reason of this fact the defendant company, conceiving that under the Act of July 24, 1935, it could not legally transport or cause to be transported said shipment into the State of Virginia, wrongfully and in violation of this plaintiff's rights refused to accept said shipment and

to transport same, and evidenced its refusal by endorsing upon said bill of lading these words: "Shipment refused because prohibited by Act of Congress approved July 24, 1935." Said bill of lading, with the aforesaid endorsement [fol. 11] thereon, is filed herewith as part hereof, marked Exhibit "I."

15

On August 13, 1935, in fulfillment of a bona fide order theretofore received, plaintiff tendered to the defendant, Illinois Central Railroad Company, at its station in Eddyville, Kentucky, two sacks of leather horse collars, manufactured at the plaintiff's plant at Eddyville, Kentucky, with prison labor and consigned to M. R. Odiorne at Eaton Rapids, in the State of Michigan, and requested the defendant company, in consideration of its regularly published tariff charges, to accept said shipment for transportation to its destination, said tendered shipment being evidenced by a uniform straight bill of lading of the Illinois Central Railroad Company. At the time said shipment was tendered to the defendant railroad company, the tariff is informed and therefore charges, there was in force and effect in the State of Michigan a law of that State, prohibiting the sale therein of any goods or merchandise, other than binder twine, rope and cordage, manufactured, produced or prepared wholly or in part by prison or convict labor; and by reason of this fact, the defendant company, conceiving that under the Act of July 24, 1935, it could not legally transport or cause to be transported said shipment into the State of Michigan, wrongfully and in violation of this plaintiff's rights refused to accept said shipment and to transport same, and evidenced its refusal by endorsing upon said bill of lading these words: "Shipment refused because prohibited by Act of Congress approved July 24, 1935." Said bill of lading, with the endorsement of defendant's agent thereon, is filed herewith as part hereof, marked Exhibit "J."

16

On August 13, 1935, in fulfillment of a bona fide order theretofore received, the plaintiff tendered to the defendant at its station in Eddyville, Kentucky, two sacks of cloth horse collars, manufactured at plaintiff's plant at Eddyville, Kentucky, with prison labor and consigned to J. W.

Beam at Argos, in the State of Indiana, and requested said defendant company, in consideration of its regularly published tariff charges, to accept said shipment for transportation to its destination, said tendered shipment being evidenced by a uniform straight bill of lading of the Illinois [fol. 12] Central Railroad Company. At the time said shipment was tendered to the defendant there was in force and effect in the State of Indiana a law of that State, requiring all convict-made goods sold or exposed for sale in that State to be labeled "convict made"; but the merchandise contained in the shipment tendered by the plaintiff, as herein set out, was not so labeled, and because of this fact the defendant company, conceiving that under the Act of July 24, 1935, it could not legally transport or cause to be transported said shipment into the State of Indiana, wrongfully and in violation of plaintiff's rights refused to accept said shipment and to transport same, and, as evidence of its refusal, endorsed upon said bill of lading these words: "Shipment refused because prohibited by Act of Congress approved July 24, 1935." Said bill of lading, with the aforesaid endorsement, is filed herewith as part hereof, marked Exhibit "K."

17

On August 13, 1935, in fulfillment of a bona fide order theretofore received, the plaintiff tendered to the defendant at its station in Eddyville, Kentucky, two sacks of leather horse collars, manufactured at plaintiff's plant at Eddyville, Kentucky, with prison labor and consigned to G. Ziegler at Rockwell, in the State of Iowa, and requested said defendant company, in consideration of its regularly published tariff charges, to accept said shipment for transportation to its destination, said tendered shipment being evidenced by a uniform straight bill of lading of the defendant company. At the time said shipment was tendered to the defendant company there was in force and effect in the State of Iowa a law which required each article of prison or convict-made or produced merchandise sold or exposed for sale therein to be plainly labeled so as to indicate that same was made by convict or prison labor; but the horse collars embraced in the tendered shipment were not so labeled, and by reason of this fact the defendant company,

conceiving that under the Act of July 24, 1935, it could not legally transport or cause to be transported said shipment into the State of Iowa, wrongfully and in violation of this plaintiff's rights refused to accept said shipment and to transport same, and evidenced its refusal by endorsing upon said bill of lading these words: "Shipment refused because prohibited by Act of Congress of July 24, 1935." Said bill of lading, with the aforesaid endorsement thereon, is filed herewith as part hereof, marked Exhibit "L."

[fol. 13] 18

On August 13, 1935, in fulfillment of a bona fide order theretofore received, the plaintiff tendered to the defendant at its station in Eddyville, Kentucky, five sacks of leather horse collars and three sacks of cloth horse collars, manufactured at the plaintiff's plant at Eddyville, Kentucky, with prison labor and consigned to H. C. Reinker Harness Company at Mount Horeb, in the State of Wisconsin, and requested the defendant, in consideration of its regularly published tariff charges, to accept said shipment for transportation to its destination, said tendered shipment being evidenced by a uniform straight bill of lading of the Illinois Central Railroad Company. At the time said shipment was tendered to the defendant there was in force and effect in the State of Wisconsin a law of that State, requiring all convict and prison-made goods, other than those made in Wisconsin, to be plainly labeled with the words "convict made," together with a statement of the year in which same were made and the name of the prison where made; but the articles contained in the tendered shipment herein referred to were not so labeled, and by reason of this fact the defendant company, conceiving that under the Act of July 24, 1935, it could not legally transport or cause to be transported said shipment into the State of Wisconsin, wrongfully and in violation of this plaintiff's rights refused to accept said shipment and to transport same, and evidenced its refusal by endorsing upon said bill of lading these words: "Shipment refused because prohibited by Act of Congress approved July 24, 1935." Said bill of lading, with the aforesaid endorsement thereon, is filed herewith as part hereof, marked Exhibit "M."

19

On August 13, 1935, in fulfillment of a bona fide order theretofore received, plaintiff tendered to the defendant at its station in Eddyville, Kentucky, two sacks of leather horse collars, manufactured at the plaintiff's plant in Eddyville, Kentucky, with prison labor and consigned to O. B. Carlson & Son at Appleton, in the State of Minnesota, and requested the defendant, in consideration of its regularly published tariff charges, to accept said shipment for transportation to its destination, said tendered shipment being evidenced by a uniform straight bill of lading of the defend-
[fol. 14] ant company. At the time said shipment was tendered to the defendant there was in force and effect in the State of Minnesota a law of that State, requiring all convict or prison made or produced goods or merchandise brought into that state and exposed for sale to be labeled with the words "prison made," together with a statement of the year of manufacture or production and the prison at which same were made or produced; but the horse collars embraced in the tendered shipment herein referred to were not so labeled, and by reason of this fact the defendant company, conceiving that under the Act of July 24, 1935, it could not legally transport or cause to be transported said shipment into the state of Minnesota, wrongfully and in violation of this plaintiff's rights refused to accept said shipment and to transport same, and evidenced its refusal by endorsing upon said bill of lading these words: "Shipment refused because prohibited by Act of Congress approved July 24, 1935." Said bill of lading, with the aforesaid endorsement thereon, is filed herewith as part hereof, marked Exhibit "N."

20

On August 13, 1935, in fulfillment of a bona fide order theretofore received, the plaintiff tendered to the defendant at its station in Eddyville, Kentucky, one sack of cloth and leather horse collars, manufactured at plaintiff's plant at Eddyville, Kentucky, with prison labor and consigned to E. L. Chalker at Mitchell, in the State of Georgia, and requested the defendant, in consideration of its regularly published tariff charges, to accept said shipment for transportation to its destination, said tendered shipment being evidenced by a uniform straight bill of lading of the de-

fendant company. At the time said shipment was tendered to the defendant there was in force and effect in the State of Georgia a law of that State, requiring all convict made goods exposed for sale in that State to be plainly labeled so as to indicate that they were convict made; but the shipment of collars referred to herein were not so labeled, and by reason of this fact the defendant company, conceiving that under the Act of July 24, 1935, it could not legally transport or cause to be transported said shipment into the State of Georgia, wrongfully and in violation of this plaintiff's rights refused to accept said shipment and to transport same, and, as evidence of its refusal, endorsed upon said bill of lading these words: "Shipment refused because prohibited by Act of Congress approved July 24, 1935." Said bill of lading, with the aforesaid endorse-
[fol. 15] ment thereon, is filed herewith as part hereof, marked Exhibit "O."

21

On August 13, 1935, in fulfillment of a bona fide order theretofore received, plaintiff tendered to the defendant at its station in Eddyville, Kentucky, two sacks of cloth horse collars, manufactured at plaintiff's plant at Eddyville, Kentucky, with prison labor and consigned to Charleston Hardware Company at Charleston, in the State of West Virginia, and requested the defendant, in consideration of its regularly published tariff charges, to accept said shipment for transportation to its destination, said tendered shipment being evidenced by a uniform straight bill of lading of the Illinois Central Railroad Company. At the time said shipment was tendered to the defendant there was in force and effect in the State of West Virginia no law in any wise restricting the shipment of convict made goods from other States into that State, or the sale or possession of such goods in that State, or requiring that said merchandise or the container thereof should be so labeled as to indicate that said goods were convict made, and the package containing the tendered shipment herein referred to was not so labeled as to show the name and location of the prison at which they were made, as is required by Section 2 of the invalid and unconstitutional Act of July 24, 1935, and because of this fact the defendant, wrongfully and in violation of this plaintiff's rights, refused to accept said shipment and to transport same, and, as evidence of its refusal,

endorsed upon said bill of lading these words: "Shipment refused because prohibited by Act of Congress approved July 24, 1935." Said bill of lading, with the aforesaid endorsement thereon, is filed herewith as part hereof, marked Exhibit "P."

22

On August 13, 1935, in fulfillment of a bona fide order theretofore received, plaintiff tendered to the defendant at its station in Eddyville, Kentucky, one sack of leather horse collars and one box of harness, manufactured at plaintiff's plant at Eddyville, Kentucky, with prison labor and consigned to Summers Hardware Company at Johnson City, in the State of Tennessee, and requested the defendant, in consideration of its regularly published tariff [fol. 16] charges, to accept said shipment for transportation to its destination, said tendered shipment being evidenced by a uniform straight bill of lading of the Illinois Central Railroad Company. At the time said shipment was tendered to the defendant there was in force and effect in the State of Tennessee no law in any wise restricting the shipment of convict made goods from other States into that State, or the sale or possession of such goods in that State, or requiring that said merchandise or the container thereof should be so labeled as to indicate that said goods were convict made, and the package containing the tendered shipment herein referred to was not so labeled as to show the name and location of the prison at which they were made, as is required by Section 2 of the invalid and unconstitutional Act of July 24, 1935, and because of this fact the defendant, wrongfully and in violation of this plaintiff's rights, refused to accept said shipment and to transport same, and, as evidence of its refusal, endorsed upon said bill of lading these words: "Shipment refused because prohibited by Act of Congress approved July 24, 1935." Said bill of lading, with the aforesaid endorsement thereon, is filed herewith as part hereof, marked Exhibit "Q."

23

On August 13, 1935, in fulfillment of a bona fide order theretofore received, plaintiff tendered to the defendant at its station in Eddyville, Kentucky, six sacks of leather horse collars, manufactured at plaintiff's plant at Eddyville,

Kentucky, with prison labor and consigned to P. F. West at Eutawville, in the State of South Carolina, and requested the defendant, in consideration of its regularly published tariff charges, to accept said shipment for transportation to its destination, said tendered shipment being evidenced by a uniform straight bill of lading of the Illinois Central Railroad Company. At the time said shipment was tendered to the defendant there was in force and effect in the State of South Carolina no law in any wise restricting the shipment of convict made goods from other States into that State, or the sale or possession of such goods in that State, or requiring that said merchandise or the container thereof should be so labeled as to indicate that said goods were convict made, and the package containing the tendered shipment herein referred to was not so labeled as to show the name and location of the prison at which they were made, as is required by Section 2 of the invalid and unconstitutional Act of July 24, 1935; and be [fol. 17] cause of this fact the defendant, wrongfully a in violation of this plaintiff's rights, refused to accept said shipment and to transport same, and, as evidence of its refusal, endorsed upon said bill of lading these words; "Shipment refused because prohibited by Act of Congress approved July 24, 1935." Said bill of lading, with the aforesaid endorsement thereon, is filed herewith as part hereof, marked Exhibit "R."

24

On August 13, 1935, in fulfillment of a bona fide order theretofore received, plaintiff tendered to the defendant at its station in Eddyville, Kentucky, two sacks of leather horse collars and one box of harness, manufactured at plaintiff's plant at Eddyville, Kentucky, with prison labor and consigned to L. Levy & Son at Natchitoches, in the State of Louisiana, and requested the defendant, in consideration of its regularly published tariff charges, to accept said shipment for transportation to its destination, said tendered shipment being evidenced by a uniform straight bill of lading of the Illinois Central Railroad Company. At the time said shipment was tendered to the defendant there was in force and effect in the State of Louisiana no law in any wise restricting the shipment of convict made goods from other States into that State, or the sale

or possession of such goods in that State, or requiring that said merchandise or the container thereof should be so labeled as to indicate that said goods were convict made, and the package containing the tendered shipment herein referred to was not so labeled as to show the name and location of the prison at which they were made, as is required by Section 2 of the invalid and unconstitutional Act of July 24, 1935; and because of this fact the defendant, wrongfully and in violation of this plaintiff's rights, refused to accept said shipment and to transport same, and, as evidence of its refusal, endorsed upon said bill of lading these words: "Shipment refused because prohibited by Act of Congress approved July 24, 1935." Said bill of lading, with the aforesaid endorsement thereon, is filed herewith as part hereof, marked Exhibit "S."

25

On August 13, 1935, in fulfillment of a bona fide order theretofore received, plaintiff tendered to the defendant at its station in Eddyville, Kentucky, two sacks of cloth horse [fol. 18] collars, manufactured at plaintiff's plant at Eddyville, Kentucky, with prison labor and consigned to R. B. True at Newbern, in the State of Alabama, and requested the defendant, in consideration of its regularly published tariff charges, to accept said shipment for transportation to its destination, said tendered shipment being evidenced by a uniform straight bill of lading of the Illinois Central Railroad Company. At the time said shipment was tendered to the defendant there was in force and effect in the State of Alabama no law in any wise restricting the shipment of convict made goods from other States into that State, or the sale or possession of such goods in that State, or requiring that said merchandise or the container thereof should be so labeled as to indicate that said goods were convict made, and the package containing the tendered shipment herein referred to was not so labeled as to show the name and location of the prison at which they were made, as is required by Section 2 of the invalid and unconstitutional Act of July 24, 1935; and because of this fact the defendant, wrongfully and in violation of this plaintiff's rights, refused to accept said shipment and to transport same, and, as evidence of its refusal, endorsed upon said bill of lading these words: "Shipment refused because

prohibited by Act of Congress approved July 24, 1935." Said bill of lading, with the aforesaid endorsement thereon, is filed herewith as part hereof, marked Exhibit "T."

26

On August 13, 1935, in fulfillment of a bona fide order theretofore received, plaintiff tendered to the defendant at its station in Eddyville, Kentucky, two sacks of leather horse collars, manufactured at plaintiff's plant at Eddyville, Kentucky, with prison labor and consigned to G. M. Giffee at Platte City, in the State of Missouri, and requested the defendant, in consideration of its regularly published tariff charges, to accept said shipment for transportation to its destination, said tendered shipment being evidenced by a uniform straight bill of lading of the Illinois Central Railroad Company. At the time said shipment was tendered to the defendant there was in force and effect in the State of Missouri no law in any wise restricting the shipment of convict made goods from other States into that State, or the sale or possession of such goods in that State, or requiring that said merchandise or the container thereof should be so labeled as to indicate that said [fol. 19] goods were convict made, and the package containing the tendered shipment herein referred to was not so labeled as to show the name and location of the prison at which they were made, as is required by Section 2 of the invalid and unconstitutional Act of July 24, 1935; and because of this fact the defendant, wrongfully and in violation of this plaintiff's rights, refused to accept said shipment and to transport same, and, as evidence of its refusal, endorsed upon said bill of lading these words: "Shipment refused because prohibited by Act of Congress approved July 24, 1935." Said bill of lading, with the aforesaid endorsement thereon, is filed herewith as part hereof, marked Exhibit "U."

27

On August 13, 1935, in fulfillment of a bona fide order theretofore received, plaintiff tendered to the defendant at its station in Eddyville, Kentucky, one sack of cloth horse collars, manufactured at plaintiff's plant at Eddyville, Kentucky, with prison labor and consigned to Hubbard Hardware Company at Blytheville, in the State of Arkansas, and requested the defendant, in consideration

of its regularly published tariff charges, to accept said shipment for transportation to its destination, said tendered shipment being evidenced by a uniform straight bill of lading of the Illinois Central Railroad Company. At the time said shipment was tendered to the defendant there was in force and effect in the State of Arkansas no law in any wise restricting the shipment of convict made goods from other States into that State, or requiring that said merchandise or the container thereof should be so labeled as to indicate that said goods were convict made, and the package containing the tendered shipment herein referred to was not so labeled as to show the name and location of the prison at which they were made, as is required by Section 2 of the invalid and unconstitutional Act of July 24, 1935; and because of this fact the defendant, wrongfully and in violation of this plaintiff's rights, refused to accept said shipment and to transport same, and, as evidence of this refusal, endorsed upon said bill of lading these words: "Shipment refused because prohibited by Act of Congress approved July 24, 1935." Said bill of lading, with the aforesaid endorsement thereon, is filed herewith as part hereof, marked Exhibit "V."

[fol. 20] 28

On August 13, 1935, in fulfillment of a bona fide order theretofore received, plaintiff tendered to the defendant at its station in Eddyville, Kentucky, one sack of cloth horse collars, manufactured at plaintiff's plant in Eddyville, Kentucky, with prison labor and consigned to Western Hardware Corporation at Muskogee, in the State of Oklahoma, and requested the defendant, in consideration of its regularly published tariff charges, to accept said shipment for transportation to its destination, said tendered shipment being evidenced by a uniform straight bill of lading of the Illinois Central Railroad Company. At the time said shipment was tendered to the defendant there was in force and effect in the State of Oklahoma no law in any wise restricting the shipment of convict made goods from other States into that State, or the sale or possession of such goods in that State, or requiring that said merchandise or the container thereof should be so labeled as to indicate that said goods were convict made, and the package containing the tendered shipment herein referred to

was not so labeled as to show the name and location of the prison at which they were made, as is required by Section 2 of the invalid and unconstitutional Act of July 24, 1935; and because of this fact the defendant, wrongfully and in violation of this plaintiff's rights, refused to accept said shipment and to transport same, and, as evidence of its refusal, endorsed upon said bill of lading these words: "Shipment refused because prohibited by Act of Congress approved July 24, 1935." Said bill of lading, with the aforesaid endorsement thereon, is filed herewith as part hereof, marked Exhibit "W."

29

On August 13, 1935, in fulfillment of a bona fide order theretofore received, plaintiff tendered to the defendant at its station in Eddyville, Kentucky, two sacks of leather horse collars, manufactured at plaintiff's plant at Eddyville, Kentucky, with prison labor and consigned to Galloway James Company at Baltimore, in the State of Maryland, and requested the defendant, in consideration of its regularly published tariff charges, to accept said shipment for transportation to its destination, said tendered shipment being evidenced by a uniform straight bill of lading of the Illinois Central Railroad Company. At the time said shipment was tendered to the defendant there was in [fol. 21] force and effect in the State of Maryland no law in any wise restricting the shipment of convict made goods from other States into that State, or the sale or possession of such goods in that State, or requiring that said merchandise or the container thereof should be so labeled as to indicate that said goods were convict made, and the package containing the tendered shipment herein referred to was not so labeled as to show the name and location of the prison at which they were made, as is required by Section 2 of the invalid and unconstitutional Act of July 24, 1935; and because of this fact the defendant, wrongfully and in violation of this plaintiff's rights, refused to accept said shipment and to transport same, and, as evidence of its refusal, endorsed upon said bill of lading these words: "Shipment refused because prohibited by Act of Congress approved July 24, 1935." Said bill of lading, with the aforesaid endorsement thereon, is filed herewith as part hereof, marked Exhibit "X."

30

An August 13, 1935, in fulfillment of a bona fide order there-fore received, plaintiff tendered to the defendant at its station in Eddyville, Kentucky, three sacks of cloth horse collars, manufactured at plaintiff's plant at Eddyville, Kentucky, with prison labor and consigned to Mrs. M. N. Casron at Lake, in the State of Mississippi, and requested the defendant, in consideration of its regularly published tariff charges, to accept said shipment for transportation to its destination, said tendered shipment being evidenced by a uniform straight bill of lading of the Illinois Central Railroad Company. At the time said shipment was tendered to the defendant there was in force and effect in the State of Mississippi no law in any wise restricting the shipment of convict made goods from other States into that State, or the sale or possession of such goods in that State, or requiring that said merchandise or the container thereof should be so labeled as to indicate that said goods were convict made, and the package containing the tendered shipment herein referred to was not so labeled as to show the name and location of the prison at which they were made, as is required by Section 2 of the invalid and unconstitutional Act of July 24, 1935; and because of this fact the defendant, wrongfully and in violation of this plaintiff's rights, refused to accept said shipment and to transport same, and, as evidence of its refusal, endorsed upon said bill of lading these words: "Shipment refused because pro-
[fol. 22] hibited by Act of Congress approved July 24, 1935." Said bill of lading, with the aforesaid endorsement thereon, is filed herewith as part hereof, marked Exhibit "Y."

31

Plaintiff states that not only has the defendant refused to accept and transport the specific shipments hereinbefore enumerated, but it is and will be the policy of the defendant company to refuse any shipments from this plaintiff of its prison made articles, where to accept and transport such shipments would violate the terms of said unconstitutional Act of July 24, 1935; that the refusal of the defendant to accept the shipments hereinbefore set out has materially damaged this plaintiff in its business, and the refusal of

the defendant to accept other similar shipments will operate to practically destroy plaintiff's business, which is largely of an interstate character; that the plaintiff has been damaged by the refusal of the defendant to accept each of the shipments hereinbefore enumerated, and will be likewise damaged by its refusal to accept any shipments hereafter tendered to defendant and refused by it, but to recover damages on account of such refusals would require a multiplicity of suits, and the right of this plaintiff to recover damages in one suit at law on account of damages resulting to it from the practical destruction of its business is so uncertain, and the difficulty of proving the extent of such damages is so great, that plaintiff has no adequate remedy at law and it is only in a court of equity that this plaintiff can be adequately protected and secured in its right to conduct its interstate commerce business in the useful and harmless articles manufactured by it.

Wherefore, plaintiff prays that the defendant be mandatorily enjoined and required to accept and transport each of the twenty-five shipments herein specifically set out, if and when re-tendered to it at its station in Eddyville, Kentucky, and enjoined and restrained from refusing to accept such shipments; that it be mandatorily enjoined and required to accept all future shipments of a similar character which may be tendered to it at its station in Eddyville, Kentucky, by this plaintiff, and enjoined and restrained from refusing to so accept same.

It further prays for a binding declaration of rights between this plaintiff and the defendant, decreeing and adjudging the Act of July 24, 1935, herein referred to, as violative of the Constitution of the United States, and par-
[fol. 23] ticularly adjudging and decreeing: (a) that said Act is not a valid exercise of the power conferred upon Congress by the Constitution of the United States to regulate commerce with foreign nations, among the several States, and with the Indian tribes, but on the contrary is an unconstitutional attempt upon the part of Congress to prohibit, regulate and interfere with the purely local business of manufacturing and producing useful and harmless articles of commerce; (b) that said Act is an unconstitutional attempt on the part of Congress to deal with matters reserved to the States and to the people by the Tenth Amendment to the Constitution of the United States; (c) that said Act is violative of the Fifth Amendment to the

Constitution of the United States, in that it deprives the plaintiff of its property, including its right to do business in interstate commerce, without due process of law; (d) that said Act is an unconstitutional attempt on the part of Congress to so exercise its power to regulate interstate commerce as to permit the respective States of the Union, under the protection of said Act, to prohibit and regulate interstate transactions between their inhabitants and the inhabitants of other States with reference to useful and harmless articles of commerce; and that pursuant to such declaration of rights the defendant be forever enjoined and restrained from observing or applying said unconstitutional Act with reference to shipments of the merchandise of the plaintiff of the character herein set out, when tendered by plaintiff to defendant for transportation in interstate commerce. It prays for its cost and all other equitable relief to which it may be entitled.

Kentucky Whip & Collar Company, by Chas. I. Dawson, Attorney. Woodward, Dawson & Hobson, Attorneys.

Duly sworn to by R. S. Mason. Jurat omitted in printing.

[fol. 24] IN UNITED STATES DISTRICT COURT

MOTION FOR INJUNCTION—Filed August 24, 1935

Plaintiff moves the Court for a permanent injunction as prayed for in the bill.

The plaintiff further moves the Court for a declaration of rights between the plaintiff and the defendant, as prayed for in the bill.

Kentucky Whip and Collar Company, by Woodward, Dawson & Hobson, Attorneys.

IN UNITED STATES DISTRICT COURT

MOTION TO DISMISS—Filed August 24, 1935

Defendant, Illinois Central Railroad Company, moves the Court to dismiss the bill of complaint and petition for a declaration of rights upon the following grounds:

(1) The bill of complaint sets forth no facts which, if true, would entitle the plaintiff to the relief for which it prays, or to any of such relief.

(2) The Declaratory Judgment Act was not intended to be used as a means for obtaining injunctive relief.

(3) This proceeding is not authorized by the provisions of the Declaratory Judgment Act, and cannot be maintained.

(4) The Act of Congress approved July 24, 1925, relative to the transportation of prison-made goods in certain cases is constitutional and affords no basis for the relief prayed for by plaintiff.

(5) The bill of complaint on its face shows a lack of equity.

Trabue, Doolan, Helm & Helm, Counsel for Defendant.

Have seen and no objection to substituting this for original motion and giving it the original filing date, the original to be withdrawn from the record.

Woodward, Dawson & Hobson.

[fol. 25] IN UNITED STATES DISTRICT COURT

STIPULATION AS TO SUBMISSION—Filed August 24, 1935

The plaintiff, Kentucky Whip and Collar Company, by Woodward, Dawson and Hobson, its counsel, and the defendant, Illinois Central Railroad Company, by its counsel, Trabue, Doolan, Helm and Helm, agree that this cause may be finally submitted to the Court upon the bill, plaintiff's motion for final decree granting it an injunction as prayed for in the bill, and for final and binding declaration of rights, as prayed for in the bill, and upon the defendant's motion to dismiss the bill.

Woodward, Dawson & Hobson, Attorneys for Plaintiff. Trabue, Doolan, Helm & Helm, Attorneys for Defendant.

IN UNITED STATES DISTRICT COURT

MOTION FOR THE UNITED STATES OF AMERICA TO BE ALLOWED TO APPEAR AS AMICUS CURIAE—Filed August 24, 1935

Comes the United States of America by counsel, Bunk Gardner, United States Attorney in and for the Western District of Kentucky, and moves the Court that it be allowed to appear as amicus curiae herein.

Bunk Gardner, United States Attorney.

August 24, 1935.

[fol. 26] IN UNITED STATES DISTRICT COURT

PRELIMINARY INJUNCTION—Filed August 26, 1935

This cause having been submitted to the court for final decree upon the verified bill, the motion of the plaintiff for an injunction and a declaration of rights in accordance with the prayer of the bill, and the defendant's motion to dismiss the bill; and the court being satisfied that there is substantial doubt as to the constitutionality of the Act of Congress of July 24, 1935, attacked in the bill, and it appearing that the plaintiff's business will be materially injured by defendant's refusal, during the time this cause is being considered by the court, to accept shipments of the character of those specifically set out in the bill and tendered to it under the circumstances mentioned in the bill, and that plaintiff has no adequate remedy at law to protect it against such present and threatened injury;—

Now, in order to protect plaintiff against such injury, while this cause is being considered by the court, It Is Ordered, Adjudged and Decreed by the court that pending the further order of this court the defendant, Illinois Central Railroad Company, is enjoined and commanded, if, as and when same are again tendered to it by the plaintiff, to accept for transportation to the consignee each and all of the twenty-five specific shipments set out in the bill, said shipments being as follows: One sack of leather horse collars consigned to C. K. Sutherland at Ajo, Arizona; four sacks of cloth horse collars consigned to H. E. Dusman at York, Pennsylvania; two sacks of leather horse collars and one sack of cloth horse collars consigned to Asheville Army

Store at Asheville, North Carolina; three sacks of cloth horse collars consigned to Kerth-Mangold Hardware Company at Anna, Illinois; two sacks of cloth horse collars consigned to Clyde C. Smith at Ashland, Ohio; two sacks of cloth horse collars consigned to L. S. Crandall at Kingman, Kansas; eight sacks of cloth horse collars and one box of harness consigned to Arch C. Ellis at McKinney, Texas; three sacks of cloth horse collars and one sack of leather horse collars consigned to Paul Hessler at Falls City, Nebraska; two boxes of harness and eleven sacks of leather horse collars consigned to Hill Hardware Corporation at Amhurst, Virginia; two sacks of leather horse collars consigned to M. R. Odiorne at Eaton Rapids, Michigan; two sacks of cloth horse collars consigned to J. W. Beam at Argos, Indiana; two sacks of leather horse collars consigned to G. Ziegler at Rockwell, Iowa; five sacks of leather horse collars and three sacks of cloth horse collars con- [fol. 27] signed to H. C. Reinker Harness Company at Mount Horeb, Wisconsin; two sacks of leather horse collars consigned to O. B. Carlson & Son at Appleton, Minnesota; one sack of cloth and leather horse collars consigned to E. L. Chalkler at Mitchell, Georgia; two sacks of cloth horse collars consigned to Charleston Hardware Company at Charleston, West Virginia; one sack of leather horse collars and one box of harness consigned to Summers Hardware Company at Johnson City, Tennessee; six sacks of leather horse collars consigned to P. F. West at Eutawville, South Carolina; two sacks of leather horse collars and one box of harness consigned to L. Levi & Son at Natchitoches, Louisiana; two sacks of cloth horse collars consigned to R. B. True at Newbern, Alabama; two sacks of leather horse collars consigned to G. M. Giffee at Platte City, Missouri; one sack of cloth horse collars consigned to Hubbard Hardware Company at Blytheville, Arkansas; one sack of cloth horse collars consigned to Western Hardware Corporation at Muscogee, Oklahoma; two sacks of leather horse collars consigned to Galloway James Company at Baltimore, Maryland; three sacks of cloth horse collars consigned to Mrs. M. N. Casron at Lake, Mississippi.

It Is Further Ordered and Decreed that pending further order of this court the defendant, Illinois Central Railroad Company, is enjoined and restrained from refusing to accept for transportation and delivery to the consignee in other States other and similar shipments when tendered

by the plaintiff to the defendant at its station in Eddyville, Kentucky.

This order is condit oned upon the plaintiff executing to the defendant a bond in the usual form, with surety to be approved by the court, in the sum of One Thousand Dollars ($1,000.00), and the plaintiff having tendered bond in said sum, with National Surety Corporation as surety, and same having been approved by the court, this order is now decreed to be in full force and effect.

The court takes this cause under advisement on final submission on the prayer of the plaintiff for a permanent injunction and for a binding declaration of rights, and on defendant's motion to dismiss the bill.

Elwood Hamilton, Judge.

August 26, 1935.

Have seen and service waived this Aug. 26, 1935.

Trabue, Doolan, Helm & Helm, Attys. for Defendant.

[fol. 28] IN UNITED STATES DISTRICT COURT

TRIAL ORDER—Entered August 24, 1935

This cause came on to be heard. Both sides appeared by counsel and announced ready.

The plaintiff by counsel tendered a motion for permanent injunction as prayed for in the Bill and also moved the Court for declaration of rights between the plaintiff and the defendant. Said motion is ordered to be filed.

Then Hon. Bunk Gardner, United States Attorney, tendered a motion asking that the United States of America be allowed to appear herein as amicus curiae. Said motion is ordered to be filed and the Court being advised, it is sustained and the United States of America, by its attorney or attorneys, may appear in this case as amicus curiae.

Counsel for the defendant tendered a motion to dismiss the Bill for various grounds set out in full in said motion. The motion to dismiss is ordered to be filed.

Then the parties tendered a stipulation signed by the respective counsel, Woodward, Dawson & Hobson for plaintiff and Trabue, Doolan, Helm & Helm for defendant, agreeing that the cause may be finally submitted on the bill, motion for injunction, motion for declaration of rights as

prayed for in the bill and upon defendant's motion to dismiss the bill.

The Court, having heard the argument of counsel, takes the case under advisement with leave to United States Attorney to file brief.

Elwood Hamilton, Judge.

August 24, 1935.

Copy. L. Phelps, Clerk.
No charge.

[fol. 29] IN UNITED STATES DISTRICT COURT

OPINION—Filed October 3, 1935.

On August 28, 1935, a preliminary mandatory injunction was issued in this action in accordance with the prayer of the petition, and since that date has been in full force and effect. The case is now finally submitted on the motion of the plaintiff for a perpetual injunction, and motion of the defendant to dismiss the bill.

The plaintiff, Kentucky Whip & Collar Company, is a corporation organized under the laws of the Commonwealth of Kentucky, with its principal place of business at Eddyville, Kentucky. It has been for many years and is now engaged in the business of manufacturing in the Kentucky State Penitentiary at Eddyville, Kentucky, with convict labor, horse collars and strap goods, and has marketed and sold its products throughout the States of the Union.

The defendant, Illinois Central Railroad Company, is a corporation incorporated under the laws of the State of Illinois, and is a citizen of that State. It is engaged in the business of a common carrier by rail and is the principal carrier of the plaintiff's products to its customers.

The amount involved in this action exceeds Three Thousand Dollars.

The plaintiff enjoyed a very large trade in several states of the Union. Its products are useful articles of commerce and are not in any particular harmful to the health, peace, or good order of the communities into which they are shipped.

The plaintiff, on August 13, 1935, tendered to the defendant, the Illinois Central Railroad, at its freight station at

Eddyville, Kentucky, without any brand or mark thereon, certain of its manufactured goods which had been produced in their entirety with prison labor under contract with the Commonwealth of Kentucky in its penitentiary at Eddyville, Kentucky. These articles had been previously sold to customers and consigned to them for shipment by the defendant to the States of Arizona and Pennsylvania, which states at the time the shipment was tendered, by their laws, prohibited the sale within their borders of goods or merchandise manufactured in whole or in part by convict labor anywhere, other than by convicts or prisoners on parole or probation; to the State of North Carolina, which state at the time the shipment was tendered, by its laws, prohibited the sale within its borders of any goods or merchandise, other than farm products, coal and chert, manufactured in whole or in part by convict labor anywhere, other than by [fol. 30] convicts or prisoners on parole or probation; to the State of Illinois, which state at the time the shipment was tendered, by its laws, prohibited the sale within its borders of goods, or merchandise, other than agricultural limestone produced in the penal and reformatory institutions of that state, manufactured in whole or in part by convict labor anywhere other than by convicts or prisoners on parole or probation; to the States of Ohio, Kansas and Texas, which states at the time the shipment was tendered, by their laws, prohibited the sale within their borders of goods or merchandise produced or prepared wholly or in part by convicts or convict labor of other states, other than by convicts or prisoners on parole or probation; to the State of Nebraska, which state at the time the shipment was tendered, by its laws, prohibited the sale of any convict-made or produced goods or merchandise, other than farm supplies, machinery and equipment, manufactured in whole or in part by convict labor anywhere, other than by convicts on parole or probation; to the State of Virginia, which State at the time the shipment was tendered, by its laws, prohibited the sale of any goods or merchandise convict-made, unless made or produced in the State of Virginia; to the State of Michigan, which state at the time the shipment was tendered, by its laws, prohibited the sale of any goods or merchandise other than binder twine, rope and cordage, manufactured in whole or in part by convict labor; to the State of Indiana, which state at the time the shipment was tendered, by its laws, required all convict-made goods sold

or exposed in that state to be labeled "convict-made"; to the State of Iowa, which state at the time the shipment was tendered, by its laws, required each article of prison or convict-made merchandise sold or exposed for sale to be plainly labeled to indicate same was made by convict or prison labor; to the State of Wisconsin, which state, at the time the shipment was tendered, by its laws, required all convict-made merchandise, other than those made in Wisconsin to be plainly labeled "convict-made," together with a statement of the year when made and the name of the prison where made; to the State of Minnesota, which state at the time the shipment was tendered, by its laws, required all convict made merchandise brought into that state and exposed for sale to be labeled "prison-made," together with a statement of the year of manufacture and the prison at which produced; to the State of Georgia, which state at the time the shipment was tendered, by its laws, required all [fol. 31] convict-made goods exposed for sale in that state to be plainly labeled so as to indicate they were convict-made; to the States of West Virginia, Tennessee, South Carolina, Louisiana, Alabama, Missouri, Arkansas, Oklahoma, Maryland, and Mississippi, which states at the time the shipment was tendered had no law in anywise restricting the shipment of convict made goods from other states or requiring them to be labeled so as to indicate that said goods were convict made.

Defendant refused to accept said shipments and to transport same, and upon the bills of lading endorsed the following words, "Shipment refused because prohibited by Act of Congress approved July 24, 1935." Said Act, which is entitled "An Act to Prohibit the Interstate Transportation of Prison-Made Products in Certain Cases," is as follows:

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That it shall be unlawful for any person knowingly to transport or cause to be transported, in any manner or by any means whatsoever, or aid or assist in obtaining transportation for or in transporting any goods, wares, and merchandise manufactured, produced, or mined wholly or in part by convicts or prisoners (except convicts or prisoners on parole or probation), or in any penal or reformatory institution, from one State, Territory, Puerto Rico, Virgin

Islands, or District of the United States, or place non-contiguous but subject to the jurisdiction thereof, or from any foreign country, into any State, Territory, Puerto Rico, Virgin Islands, or District of the United States, or place non-contiguous but subject to the jurisdiction thereof, where said goods, wares, and merchandise are intended by any person interested therein to be received, possessed, sold, or in any manner used, either in the original package or otherwise in violation of any law of such State, Territory, Puerto Rico, Virgin Islands, or District of the United States, or place non-contiguous but subject to the jurisdiction thereof. Nothing herein shall apply to commodities manufactured in Federal penal and correctional institutions for use by the Federal Government.

Sec. 2. All packages containing any goods, wares, and merchandise manufactured, produced, or mined wholly or [fol. 32] in part by convicts or prisoners, except convicts or prisoners on parole or probation, or in any penal or reformatory institution, when shipped or transported in interstate or foreign commerce shall be plainly and clearly marked, so that the name and address of the shipper, the name and address of the consignee, the nature of the contents, and the name and location of the penal or reformatory institution where produced wholly or in part may be readily ascertained on an inspection of the outside of such package.

Sec. 3. Any person violating any provision of this Act shall for each offense, upon conviction thereof, be punished by a fine of not more than $1,000, and such goods, wares, and merchandise shall be forfeited to the United States, and may be seized and condemned by like proceedings as those provided by law for the seizure and forfeiture of property imported into the United States contrary to law.

Sec. 4. Any violation of this Act shall be prosecuted in any court having jurisdiction of crime within the district in which said violation was committed, or from, or into which any such goods, wares, or merchandise may have been carried or transported, or in any Territory, Puerto Rico, Virgin Islands, or the District of Columbia, contrary to the provisions of this Act."

Plaintiff prays for a binding declaration of rights between this plaintiff and defendant, decreeing and adjudging

the Act violative of the Constitution of the United States because (1) said Act is not a valid exercise of the power conferred upon Congress by the Constitution to regulate commerce with foreign nations, among the several states, but is an unconstitutional attempt by Congress to prohibit, regulate and interfere with the purely local business of manufacturing and producing useful and harmless articles of commerce; (2) said Act is an unconstitutional attempt on the part of Congress to deal with matters reserved to the States and the people by the Tenth Amendment to the Constitution of the United States; (3) that it is violative of the Fifth Amendment to the Constitution of the United States in that it deprives the plaintiff of its property, including the right to do business in interstate commerce, without due process of law; (4) that it is an unconstitutional attempt on the part of Congress to so exercise its power to regulate interstate commerce as to permit the [fol. 33] respective States of the Union, under the protection of said Act, to prohibit and regulate interstate transactions between their inhabitants and the inhabitants of other States with reference to useful and harmless articles of commerce.

Is the Act complained of a valid exercise of the power of Congress to regulate commerce among the several States? Constitution, Section 8 (3).

The Government of the United States can claim no powers not granted to it by the Constitution either expressly given or by necessary implication. The words used in the Constitution are to be taken in their natural and obvious sense and not in a sense unreasonably restricted or enlarged, and in considering the powers conferred on the central government by the States under this instrument, we must always keep in mind the objects and purposes for which the powers granted were conferred.

Disordered commerce among the States contributed largely to the fall of the original Confederacy. It was soon found, following the Revolution, that it was idle and visionary to suppose that while thirteen independent states possessed the exclusive power of regulating commerce there would be found any uniform system or harmony or cooperation for the general welfare.

The necessity of power being lodged in the central government to regulate commerce among the states was one

of the prime causes for the establishment of the Constitution. "It is a power vital to the prosperity of the Union and without it the Government would scarcely deserve the name of National Government and would soon sink into discredit and imbecility. It would stand as a mere shadow of sovereignty to mock our hopes and involve us in a common ruin." Story on the Constitution, Vol. 2, page 2.

This enumerated power of the Federal Government to regulate commerce among the several States has been the subject of endless discussion from the adoption of the Constitution to the present time. It has been used as both a shield and a sword. Industry enjoying the special privileges of Government has set it up as a breastwork of defense against dislodgement and others have used it to invade the rights of one group to their own advantage. Its beneficent purpose should never be disregarded by Courts in interpreting its meaning. It should be used only for promoting the general welfare and securing the blessings of liberty to ourselves and our posterity.

It is said by counsel for the plaintiff that the Act here involved contravenes the Constitution in that it is not a [fol. 34] proper regulation of commerce among the States, and for that reason the Court should strike it down. The overthrow by the Courts of an Act of Congress involves the gravest responsibility and should never be done except where the Congress has disregarded the plain or implied restraints of the Constitution. The use of the power to regulate commerce is not confined exclusively to the promotion of trade among the states. It can be used to promote the public welfare in every particular, which includes health, morals, public safety, peace and good order. It can also be used to prevent fraud, deceit and imposition in trade, sales and contracts relating to the disposition of manufactured goods.

New necessities, new evolutions of society into more complex conditions evoke the exercise of an old power in a new way. The control of new things does not require new power if the old power still exists.

Improved transportation and communication, rapid exchanges because of new inventions, have widened the scope and expedited the distribution of manufactured goods. No longer can the doctrine of laissez faire or the buyer beware

accord to our citizens the protection they deserve in the purchase of goods, food, or clothing.

If it would be of substantial benefit to the purchaser of manufactured products to know their place of origin and conditions under which manufactured, the Congress has the right to use the commerce clause of the Constitution to confer on them its benefits in the purchase and use of the products of trade.

Before the Act here in question was passed by the Congress twenty-two states of the Union had passed legislation either prohibiting or regulating the sale of convict-made goods.

The criminal code and the conduct of penitentiaries have in recent years undergone great changes. Punishment is yielding some of its rigors to reformation. Most penitentiaries are no longer dismal, unsanitary places of detention for the broken and moral defective, where idleness makes the bad worse. Convicts are no longer the pawns of outside contractors. Idleness of inmates is the dread of all prison superintendents. However, useful work may be found for the inmate at penal institutions under the modern system without using unskilled hands to manufacture and place on the market inferior goods.

Prisoners may be gainfully employed in building useful public institutions in the States. No better illustration of this fact can be found than in the Commonwealth of Ken-
[fol. 35] tucky. Its penal and charitable institutions are antiquated, unsanitary, crowded, expensive to operate and wholly inadequate for the purpose for which intended. The Commonwealth is blessed with abundant raw material for the erection of either stone or brick buildings. All of its institutions are now overcrowded, and every inmate capable of work could be used for the building of modern new institutions, which would be a blessing to our mental defectives and moral delinquents. Similar projects could be carried out by convicts in other States of the Union. There is no likelihood of deceit or fraud being practiced on the public by this type of work as is often the case where convict labor is used for the manufacture and sale of articles of trade.

It has been the practice in some instances of persons dealing in convict made goods to represent that the manu-

facturing was done in free institutions and by skilled labor. The Federal Trade Commission has found this to be an unfair trade practice. See the proceedings of that body in the matter of Commonwealth Manufacturing Company and Harry Dushoff, doing business under the trade names and styles of Harry Dushoff & Company, and Chicago Manufacturing Company, Docket No. 1367.

Usually the place of manufacture of an article is disclosed as a matter of advertising and good will; and so far as I know no producer of a product in general use and sale has sought to conceal the place of production. The fact that the plaintiff in the case at bar contends that his business would be destroyed if required to label his product is strongly persuasive that the buying public attaches great importance to the place of manufacture, and a regulation requiring labeling is not in conflict with the Constitution.

The framers of the Constitution never intended that the power lodged in the Congress to legislate should be subject to the control of the Judiciary if there was a basis for the Congressional action, no matter how slight in fact it might be. It is only necessary for me to decide in this case that there was a slight basis for the Act of Congress in requiring the labeling of the plaintiff's product when tendered for shipment in interstate commerce, and such a basis undoubtedly existed. Courts have many times sustained legislation essentially similar to the Act here in question.

In re Rahrer, 140 U. S. 545;

Adams, et al. v. Tanner, Attorney General of the State of Washington et al., 244 U. S. 590;

[fol. 36] Whitfield v. State of Ohio, 196 N. E. 164, 129 Ohio State 543. (See opinion of lower court, Court of Appeals, Cuyahoga County, State of Ohio, Eighth District, not reported);

Carey v. State of South Dakota, 250 U. S. 118;

Schellenberger v. Pennsylvania, 171 U. S. 1;

L. & N. R. R. Co. v. F. W. Cook Brewing Co., 223 U. S. 70;

Hutchinson Ice Cream Co. et al. v. State of Iowa, 242 U. S. 153;

Hygrade Provision Co. Inc. et al. v. Sherman as Attorney General of the State of New York, et al., 266 U. S. 497;

Brazee v. People of the State of Michigan, 241 U. S. 340;
Powell v. Pennsylvania, 127 U. S. 678;
Miller v. Wilson, Sheriff of Riverside County, State of California, 236 U. S. 373;
Lottery Cases, 188 U. S. 321;
Hoke v. United States, 227 U. S. 306;
Ripolite Egg Co. v. United States, 220 U. S. 45;
Weeks v. United States, 245 U. S. 618;
Webster v. Freed, 239 U. S. 233;
Rupert v. United States, 181 F. 87;
Lacost v. Department of Conservation, 263 U. S. 545;
Missouri v. Holland, 252 U. S. 415;
Detweiller v. Welch, 46 F. (2) 71;
State of Wyoming v. W. S. Buch Mercantile Co. et al., 264 Pac. 1023; 57 A. L. R. 675;
People of the State of New York v. Beakes Dairy Co., 222 N. Y. 416; 119 N. E. 115; 3 A. L. R. 1260;
Nebbia v. New York, 291 U. S. 502;
Lemke as Attorney General of the State of N. Dakota et al. v. Farmers Grain Co., 258 U. S. 50.

The plaintiff strongly relies on the case of People of the State of New York v. Hawkins, 157 N. Y. 1, 42 L. R. A. 490, in support of its contention that neither the states nor Congress has the power to require convict-made goods to be so labeled.

The cited case was the divided opinion of the Court, and while the majority did decide that it was an unconstitutional exercise of power to mark goods "convict-made," the opinion was handed down in 1898. Conditions in trade and commerce have radically changed in thirty-seven years, and the reasons of the majority are not now well founded. [fol. 37] The opinion states as the only basis for the legislation the prevention of convict-made goods competing with free labor. This is not the only basis for such legislation. The labeling of goods "convict-made" does not interfere with placing the goods on the market, nor does it prohibit any person from buying them or dealing in them. When labeled the citizen knows where the goods he is buying were made. The labeling in no way interferes with the use of the goods, and does not affect their intrinsic value. It merely

prevents deceit and gives the public information of value to it, in determining whether or not it desires to purchase and use products manufactured in a penitentiary.

The case of Hammer v. Dagenhart, 247 U. S. 251, much relied on by the plaintiff; involved an Act of Congress that absolutely prohibited the shipment in interstate commerce of goods manufactured by children under the age of sixteen years. The Court held the act void. That act was one of absolute prohibition, while the Act here under consideration is one of regulation. The Court undertook to distinguish its opinion in that case from prior ones on the ground that the earlier acts were regulatory and this one prohibitory.

Plaintiff contends the United States is without police power similar to that exercised by the states. This contention is often made, and some of the opinions of the Courts would lend color to it, but when the question is closely examined it will be found that the Congress in exercising a power conferred on the Federal Government may adopt police regulations in the same form and manner as the States. Hoke v. United States, 227 U. S. 309; Butterfield v. Stranahan, 192 U. S. 470; Adair v. United States, 208 U. S. 161; Seven Cases v. United States, 239 U. S. 510; Cominetti v. United States, 242 U. S. 470; Brocks v. United States, 267 U. S. 432; Weber v. Freed, 239 U. S. 325; Yee Hem v. United States, 268 U. S. 178; University of Illinois v. United States, 289 U. S. 48.

Plaintiff's contention that the Act here in question must fail in all of its parts because in conflict with the Tenth and Fifth Amendments is fully answered by the reasons heretofore stated. The last ground urged is that it delegates power to the States exclusively lodged in the Federal Government. This deserves a more extended consideration.

The first section of the Act makes it unlawful to knowingly transport into a state goods manufactured by convict labor in violation of the local law. The validity of this [fol. 38] section depends on what power the Congress has over the prohibited goods in the first instance. If it has the power under the commerce clause to adopt the same regulations as the State has adopted, it can aid the State in the enforcement of its law and can adopt the State

law as its own in carrying out a power conferred on it by the Constitution. Joint action between the State and the Federal Government to remedy an evil should be encouraged when possible. Such a course promotes unity of action and harmony of purpose. It lessens conflict between the Federal and State Government and tends to uniformity of laws.

The principle of adopting state laws to carry out a Federal power is throughly settled in this country. In re. Rahrer, 140 U. S. 545; Clark Distilling Co. v. Western Maryland R. R. Co., 243 U. S. 311; United States v. Hill, 248 U. S. 420; Silz v. Hesterberg, 211 U. S. 31.

Power is lacking in either the Federal or State Governments to prohibit the shipment of labeled convict-made goods in either intra-state or interstate commerce. Such articles are legitimate objects of trade. So much of the Act here involved as prohibits their shipments or sale is void. Some of the States of the Union absolutely prohibit their shipment, and the Congress is without power to adopt or concur in the laws of these States containing absolute prohibition. However, this defect does not void so much of the Act here in question as provides for labeling the goods.

It may be safely assumed that the Congress would have passed an Act regulating the shipment of convict-made goods with the unconstitutional provision eliminated, because regulation is less severe than prohibition. El Paso & N. E. R. Co. v. Gutierrez, 215 U. S. 87; Dorchy v. Kansas, 264 U. S. 286; Pollock v Farmers Loan & Trust Co., 158 U. S. 601; Howard v. Illinois Cen. R. Co., 207 U. S. 463; Little Rock & Ft. S. R. Co. v. Worthan, 120 U. S. 97; Berea College v. Kentucky, 211 U. S. 45.

The title to the Act here in question reads, "An Act to prohibit the Interstate Transportation of Prison Made Products in Certain Cases." The plaintiff insists that this title shows a clear intention on the part of Congress to pass only a prohibitory Act, but this conclusion is not tenable in view of the fact that the body of the Act does not prohibit the shipment of goods when properly labeled according to its terms. There is no ambiguity in the Act and prohibition only arises where it is sought to assist the States in enforcing prohibitory laws. White v. United [fol. 39] States, 191 U. S. 545; Holy Trinity Church v.

United States, 143 U. S. 457; Coosaw Mining Co. v. South Carolina, 144 U. S. 350.

The economic tide is inevitably forcing on the Courts the need for giving ever expending latitude to the commerce clause of the Constitution. Any other course will unerringly lead to a retardation of our civilization.

The plaintiff's petition will be dismissed. However, the injunction heretofore issued will be continued in force during appeal.

Elwood Hamilton, Judge.

Charles I. Dawson, Woodward, Dawson & Hobson, Attorneys for Plaintiff. Trabue, Doolan, Helm & Helm, Attorneys for Defendant. Judge Bunk Gardner, U. S. District Attorney, Eli H. Brown, III, Asst. U. S. District Attorney, Amicus Curiae.

October 3, 1935.

In United States District Court

Findings of Fact, Conclusions of Law, Declaration of Rights and Decree—Filed and Entered October 9, 1935

This cause having been submitted by agreement of parties for final decree upon the pleadings, and the court having considered same,—

Now, in conformity to the prayer of the petition and of Equity Rule 70½, the court makes the following findings of fact, conclusions of law, declaration of rights, and enters the following decree:

[fol. 40] Findings of Fact

1. The plaintiff, Kentucky Whip & Collar Company, is a corporation organized under the laws of the Commonwealth of Kentucky, with its principal place of business at Eddyville, Kentucky. It has been for many years and is now engaged in the business of manufacturing, in the Kentucky State Penitentiary at Eddyville, Kentucky, with convict labor, horse collars and strap goods, and has marketed and sold its products throughout the States of the Union.

2. The defendant, Illinois Central Railroad Company, is a corporation incorporated under the laws of Illinois,

and is a citizen of that State. It is engaged in the business of a common carrier by rail, and is the principal carrier of the plaintiff's products to its customers.

3. The amount in controversy exceeds Three Thousand Dollars ($3,000.00), exclusive of interest and costs.

4. The plaintiff, on August 13, 1935, tendered to the defendant at its freight station at Eddyville, Kentucky, twenty-five separate shipments of collars and harness, manufactured by the plaintiff with prison labor at its plant in Eddyville, Kentucky, for the purpose of having these shipments transported by the defendant to the consignees thereof, each of whom was located in a State other than Kentucky. Ten of these shipments were consigned to customers in ten different States, each of whose laws prohibited the sale within the borders thereof of any goods or merchandise manufactured or produced, wholly or in part, by convict labor. Five of these shipments were consigned to States whose laws did not prohibit the sale therein of convict-made goods, but did require that any such goods exposed for sale or sold should be plainly marked so as to indicate that they were convict-made. Ten of these shipments were consigned to States whose laws impose no restrictions upon the sale or possession of convict-made goods within those States. All of the tendered shipments were for the purpose of filling bona fide orders theretofore received by the plaintiff. None of the packages or article therein contained bore any mark, label or brand thereon to indicate that the goods contained therein were manufactured or produced with prison labor. The defendant refused to accept said shipments and to transport same, and upon the bill of lading endorsed the following words: "Shipment refused because prohibited by Act of Congress approved July 24, 1935.".

[fol. 41] 5. Plaintiff's products are useful articles of commerce, and are not in themselves in any particular harmful to the health, peace or good order of the communities into which they are shipped or in which they are used.

6. Not only had the defendant refused to accept and transport the specific shipments tendered on August 13, 1935, but it is and will be the policy of the defendant company to refuse any shipments from the plaintiff of its prison-made articles, where to accept and transport such

shipments would violate the terms of the Act of Congress approved July 24, 1935.

7. The continued refusal of the defendant to accept the shipments tendered will materially damage the plaintiff in its business, and the refusal of the defendant to accept other similar shipments will operate to practically destroy plaintiff's business, which is largely of an interstate character.

CONCLUSIONS OF LAW

1. The plaintiff has no adequate remedy at law.

2. The Act of July 24, 1935, in so far as it operates to prohibit the shipment in interstate commerce of convict-made goods into those States which prohibit the sale or possession of convict-made goods, is invalid, and beyond the constitutional power of Congress. To this ruling the defendant excepts.

3. The Act, in so far as it prohibits the shipment of convict-made goods into those States which require that convict-made goods shall be so labeled as to indicate that fact before being sold or offered for sale, unless such goods are so labeled before interstate shipment, is a valid exercise of the power of Congress under the Constitution. To this ruling the plaintiff excepts.

4. Congress has the power to require that the containers of all convict-made goods shipped in interstate commerce shall, before shipment, be so labeled as to indicate that they are convict-made, and the name and location of the prison where made, as is required by section two of the Act. To this ruling the plaintiff excepts.

5. Section two of the Act is separable, and is valid and enforceable, notwithstanding the invalidity, as herein indicated, of some of the provisions of section one of the Act; and that portion of section one of the Act which operates to prohibit shipment in interstate commerce of unlabeled convict-made goods into those States prohibiting the ex-
[fol. 42] posure for sale or sale of convict-made goods unless so labeled, is also separable from the invalid part of section one of the Act, and is valid and enforceable. To all of which the plaintiff excepts.

6. As the plaintiff did not label the articles shown by the bill to have been tendered to the defendant for shipment into those States requiring convict-made articles to be so labeled before sale or exposure for sale, so as to conform to such State requirements, the defendant was not required to accept such shipments and to transport same to their destination, irrespective of the provisions of section Two of the Act. To this ruling the plaintiff excepts.

7. As the plaintiff did not label any of the containers of any of the shipments set out in the bill, as required by section Two, of the Act, defendant was not required to accept any of said shipments or to transport the same. To this ruling the plaintiff excepts.

DECREE

It Is Therefore Ordered, Adjudged And Decreed:

1. That the plaintiff's petition be and the same is hereby dismissed at the cost of the plaintiff. To which ruling the plaintiff excepts.

2. As the plaintiff has indicated its intention to take an appeal to the Circuit Court of Appeals for the Sixth Circuit, It Is Further Ordered that the preliminary injunction heretofore issued shall continue in full force and effect pending such appeal.

Elwood Hamilton, U. S. District Judge.

October 9, 1935.

[fol. 43] IN UNITED STATES DISTRICT COURT

MOTION FOR ADDITIONAL FINDING OF FACT—Filed October 10, 1935

The plaintiff, Kentucky Whip & Collar Company, moves the court that, in addition to the court's finding of fact in paragraph 5 of its finding of facts, conclusions of law, declaration of rights and decree, the court further finds that plaintiff's products are not in and of themselves in any particular harmful to the general welfare of the communities into which they are shipped; and in support of this motion, plaintiff points out that in paragraph 4 of its bill it

is specifically alleged that the articles manufactured by the plaintiff are not in any particular, in and of themselves, harmful to the general welfare of the communities into which they are shipped and in which they are used. This fact, alleged in the bill, is not denied in the record, and can not be denied.

Kentucky Whip & Collar Company, by Woodward, Dawson & Hobson, Attorneys.

IN UNITED STATES DISTRICT COURT

ORDER OVERRULING MOTION FOR ADDITIONAL FINDING OF FACT—Entered October 10, 1935

The court having considered the plaintiff's motion to find as a fact that the articles manufactured by the plaintiff in and of themselves are not harmful to the general welfare of the communities into which they are shipped and in which they are used, and being advised, overrules plaintiff's motion to make such finding; to which ruling the plaintiff excepts.

Elwood Hamilton, Judge.

October 10, 1935.

[fol. 44] IN UNITED STATES DISTRICT COURT

PETITION FOR APPEAL TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT—Filed October 10, 1935

The above named plaintiff, Kentucky Whip and Collar Company, conceiving itself aggrieved by the decree made and entered on the — day of October, 1935, in the above entitled cause, does hereby appeal from said order and decree to the United States Circuit Court of Appeals for the Sixth Circuit for the reasons specified in the assignment of errors which is filed herewith, and he prays that his appeal may be allowed, and that a transcript of the record, proceedings and papers upon which said order was made, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Sixth Circuit.

Woodward, Dawson & Hobson, Attorneys for Plaintiff.

IN UNITED STATES DISTRICT COURT

ORDER ALLOWING APPEAL—Entered October 10, 1935

This day came the plaintiff and tendered and offered to file its petition for appeal herein, together with its assignment of errors, which are ordered filed; and the court having considered same—

It Is Ordered that an appeal to the Circuit Court of Appeals for the Sixth Circuit from the decree entered herein on the 9th day of October, 1935, be and the same is allowed, and a certified transcript of the record herein be forwarded to the United States Circuit Court of Appeals for the Sixth Circuit, at Cincinnati, Ohio.

It Is Further Ordered that the appeal bond be and the same is fixed at the sum of Two Hundred Dollars ($200.00).

Elwood Hamilton, U. S. District Judge.

October 10, 1935.

[fol. 45] IN UNITED STATES DISTRICT COURT

ASSIGNMENT OF ERRORS—Filed October 10, 1935

Now comes the plaintiff, Kentucky Whip & Collar Company, and makes and files the following Assignment of Errors, upon which it will rely upon its appeal from the decree and declaration of rights entered herein on the 9th day of October, 1935:

1. The court erred in holding that the Act of July 24, 1935, in so far as it operates to prohibit the shipment in interstate commerce of convict-made goods into those States which require that convict-made goods shall be so labeled as to indicate that fact before being sold or offered for sale, unless such goods are so labeled before interstate shipment, is a valid exercise of the power of Congress under the Constitution.

2. The court erred in holding that Congress has the power to require that the containers of all convict-made goods shipped in interstate commerce shall, before shipment, be so labeled as to indicate that they are convict-made, and the name and location of the prison where made, as required by section Two of the Act of July 24, 1935.

3. The court erred in holding that section Two of the Act is separable, and is valid and enforceable, notwithstanding the invalidity of that part of Section One of the Act which operates to prohibit the shipment in interstate commerce of convict-made goods into those States where the sale of convict-made goods is prohibited by the law of such States.

4. The court erred in holding that that part of section One of the Act which operates to prohibit the shipment in interstate commerce of unlabeled convict-made goods into States requiring such goods, before sale or exposure for sale, to be so labeled as to indicate that they are convict-made, is separable, and is valid and enforceable, notwithstanding the invalid portions of section One of the Act.

5. The Court erred in holding that the defendant was not required to accept the shipments alleged in the bill to have been tendered to defendant for transportation to and delivery in those States whose laws require convict-made goods to be labeled as convict-made before sale or exposure for sale.

6. The court erred in holding that the defendant was not required to accept any of the shipments tendered to it as alleged in the bill, because the containers in which they were offered were not labeled, as required in section Two of the Act.

[fol. 46] 7. The court erred in holding that plaintiff was not entitled to the relief sought, and in dismissing its bill.

8. The court erred in refusing to find as requested by plaintiff that the articles manufactured by it in and of themselves are not harmful to the general welfare of the communities into which they are shipped and in which they are used.

Kentucky Whip & Collar Company, by Woodward, Dawson & Hobson, Attorneys.

Citation, in usual form, showing service on Trabue, Doolan, Helm & Helm, omitted in printing.

[fol. 47] Bond on appeal for $200.00, approved and filed October 10, 1935, omitted in printing.

[fol. 48] IN UNITED STATES DISTRICT COURT

PRÆCIPE FOR TRANSCRIPT OF RECORD—Filed October 10, 1935

To Lilburn Phelps, Clerk of the United States District Court for the Western District of Kentucky:

You will please incorporate in the transcript of record on appeal to the United States Circuit Court of Appeals for the Sixth Circuit in the above entitled cause the following:

1. Bill in equity and petition for a declaration of rights.
2. Motion for permanent injunction and declaration of rights.
3. Motion to dismiss.
4. Stipulation.
5. Motion of the United States of America to be allowed to appear as Amicus Curiae.
6. Preliminary injunction.
7. Order of August 24, 1935.
8. Opinion of the Court.
9. Decree, findings of fact and conclusions of law.
10. Motion for additional finding of fact.
11. Order denying motion for additional finding of fact.
12. Petition for appeal.
13. Order allowing appeal.
14. Assignment of errors.
15. Citation on appeal and notice thereof accepted by the defendant.
16. Order approving appeal bond.
17. Copy of this praecipe.
18. Clerk's certificate.

Woodward, Dawson & Hobson, Attorneys for Plaintiff.

October 10, 1935.

[fols. 49 & 50] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 51] IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

MINUTE ENTRY

Cause Argued and Submitted April 8, 1936

Before Moorman, Hicks and Simons, JJ.

This cause is argued by Charles I. Dawson for Appellant and by Blakey Helm, G. E. Dean, and U. Bon Geaslin for Appellee and is submitted to the Court.

IN UNITED STATES CIRCUIT COURT OF APPEALS

DECREE—Entered June 1, 1936

Appeal from the District Court of the United States for the Western District of Kentucky.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Western District of Kentucky, and was argued by counsel.

On Consideration Whereof, It is now here ordered, adjudged and decreed by this Court that the decree of the said District Court in this cause be and the same is hereby affirmed.

[fol. 52] IN UNITED STATES CIRCUIT COURT OF APPEALS

OPINION—Filed June 1, 1936

Before Moorman, Hicks and Simons, Circuit Judges.

MOORMAN, Circuit Judge:

The appellant employs convict labor in the manufacture of horse collars and strap goods, including harness, in a state penitentiary at Eddyville, Kentucky. It tendered to the appellee, a common carrier, at its station at Eddyville, twenty-five packages of collars and harness manufactured by it for shipment to customers in states other than Kentucky. Some of the packages were consigned to customers

in states whose laws prohibit the sale within their borders of any goods or merchandise manufactured or produced by convict labor other than by convicts or prisoners on parole or probation; others were consigned to customers residing in states whose laws do not prohibit the sale therein of convict-made goods but require that any such goods exposed or offered for sale shall be plainly marked so as to indicate that they are convict made; and others to customers residing in states whose laws impose no restrictions upon the sale or possession of convict-made goods within their borders. The appellee refused to accept the packages for shipment, giving as its reasons therefor the prohibitions and requirements of the Act of Congress of July 24, 1935, (49 Stat. 494), the Ashurst-Sumners Act, which declares: (1) That it shall be unlawful to transport or cause to be transported any goods, wares or merchandise manufactured or produced by convicts or prisoners, except convicts or prisoners on parole or probation, from one state or territory to another state or territory in the United States, where such goods, wares or merchandise are intended by any person interested therein to be received, possessed or sold, either in the original package or otherwise, in violation of any law of such state or territory; and (2) that all packages containing any goods, wares or merchandise manufactured or produced by convicts or prisoners, except convicts or prisoners on parole or probation, when shipped or transported in interstate commerce, shall be plainly and clearly marked so that the name and address of the shipper, the name and address of the consignee, the nature of the contents, and the name and location of the penal or reformatory institution where produced may be readily ascertained on an inspection of the [fol. 53] outside of such package. Following the refusal, the appellant brought this action against the appellee seeking a mandatory injunction requiring the appellee to accept the goods for shipment when re-tendered to it, and for a decree declaring the Ashurst-Sumners Act an illegal exercise of the legislative power of Congress in violation of the Fifth and Tenth Amendments to the Constitution. The trial court found as a fact that the appellant had not labeled any of the packages so as to indicate that the articles therein contained were convict made, and dismissed the bill.

The decree is attacked on the ground that it gives effect to a statute which the Congress had no power, under the commerce clause of the Constitution, to enact. It is alleged in the bill that the articles tendered to the appellee were not "in any particular whatever harmful to health, or to the peace, good order or general welfare of the communities into which they are shipped or in which they are used." The lower court found, without hearing evidence, that they "are useful articles of commerce, and are not in themselves in any particular harmful to the health, peace or good order of the communities into which they are shipped or in which they are used." It is upon the theory that the goods are innocuous in their character that the appellant insists that the act in question is invalid. We think a proper analysis of the argument is to be made in the light of the effect of the sale of the goods in competition with goods manufactured by free labor. In this view it is pertinent to consider that a "preponderant number" of the states have enacted statutes either prohibiting the sale of convict-made goods within their borders or requiring such goods, before being offered for sale therein, to be plainly marked so as to indicate the source of their manufacture. "All such legislation," as said in Whitfield v. State of Ohio, — U. S. — (decided March 2, 1936), proceeds upon the view that free labor, properly compensated, "cannot compete successfully with the enforced and unpaid or underpaid convict labor of the prison." It was also said in that case that there is "ample support in fact" for the view that the sale of convict-made goods in competition with the products of free labor is an evil. From these pronouncements it is obvious that the legislation of the states designed to prohibit this evil must be deemed to have been [fol. 54] enacted pursuant to a sound public policy; indeed, it was so held in the case just referred to in sustaining such legislation in Ohio. The question for decision, therefore, is whether Congress, in aid of the enforcement of a valid public policy of the states, may pass a law excluding convict-made articles from interstate commerce, or requiring the packages containing such articles to be labeled to indicate that the contents are convict-made before permitting them to be shipped in interstate commerce.

The Act in question is the culminating step in a course of federal legislation dealing with convict-made goods sim-

ilar to that enacted by Congress with reference to the transportation of intoxicating liquors. In January of 1929 the Congress passed the Hawes-Cooper Act (45 Stat. 1084), which provided that all goods, wares and merchandise manufactured, produced or mined by convicts or prisoners, except convicts or prisoners on parole or probation, or in any penal or reformatory institution, except commodities manufactured in federal penal and correctional institutions for use by the federal government, transported into any state or territory of the United States for use, consumption or sale, should, upon arrival and delivery in such state or territory, be subject to the operation and effect of the laws of such state or territory to the same extent and in the same manner as though such goods, wares and merchandise had been manufactured, produced or mined in such state or territory, and should not be exempt therefrom by reason of their being introduced in the original package or otherwise. The Act is almost identical with fhe language of the Wilson Act (26 Stat. 313), which dealt with intoxicating liquors, and which was upheld against the contention that it was a delegation of federal power to the states. In re Rahrer, 140 U. S. 545; Rhodes v. Iowa, 170 U. S. 412. The Hawes-Cooper Act was upheld in Whitfield v. State of Ohio, supra. Finding that the Wilson Act was not affectual in preserving to the states their freedom to establish and pursue their own public policy affecting the manufacture and sale of intoxicating liquors within their borders, the Congress enacted the Webb-Kenyon law (37 Stat. 699), which prohibited the shipment of intoxicating liquors from one state or territory into another state or [fol. 55] territory intended by any person interested therein to be received, possessed, sold or used either in the original package or otherwise, in violation of any law of such state or territory. That act bore the same relation to the Wilson Act as the Act here in controversy bears to the Hawes-Cooper Act. It was upheld in Clarke Distilling Co. v. West'n Ry. Co., 242 U. S. 311.

The appellant contends, however, that the decision in the Clark Distilling Co. case and the cases sustaining acts closing the channels of interstate commerce to lottery tickets, impure foods and drugs, stolen automobiles, and the transportation of women for immoral purposes, are inapplicable, because the Congress was dealing in those acts with subjects

inherently harmful, and its products are useful and harmless. A sufficient answer to this contention, it seems to us, is that the evils which legislation of this character seeks to remedy are not only those inherent in the nature of the article, but also those resulting from its employment and disposition. It further contends that the right to exclude its products is controlled by the Child Labor Cases, 247 U. S. 251, and 259 U. S. 20, holding invalid an Act of Congress forbidding the transportation in interstate commerce of goods made by children of certain ages. The court was of opinion and held in those cases that the Act was an attempt by Congress to impress its views of a desirable state public policy upon the states, and that Congress could not interfere with the purely internal affairs of the states by enacting legislation fixing a minimum age at which children should be permitted to work, a subject reserved to the states under the Constitution. The cases, in our opinion, are inapplicable, for in the Act here under consideration there is no attempt to foist or impose a policy on the states. The Act is a regulation of commerce among the states but does not invade or interfere with the power of the states to regulate their own internal affairs. It was enacted in aid of the maintenance and enforcement of state laws as was the Webb-Kenyon Act, which was held to be a legitimate exertion of the power to regulate commerce and not to be a delegation of congressional power to the states. The Child Labor Acts, too, did not attempt to preserve to the states their freedom to establish and pursue their own policy within their borders, but attempted to use the powers of [fol. 56] Congress over interstate commerce to impose a policy upon the states in their internal affairs to which the federal authority does not extend.

Since Congress has the power to prohibit the shipment of convict-made goods into states having laws prohibiting the sale or possession of such goods or their exposure for sale without labeling them, it would seem necessarily to follow that in aid of the enforcement of such prohibitions it may require a labeling of all packages containing convict-made goods shipped or transported in interstate commerce, regardless of their destination.

The decree is affirmed.

Clerk's certificate to foregoing transcript omitted in printing.

[fol. 57] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 12, 1936

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on cover: File No. 40,678. U. S. Circuit Court of Appeals, Sixth Circuit. Term No. 138. Kentucky Whip and Collar Company, petitioner, vs. Illinois Central Railroad Company. Petition for a writ of certiorari and exhibit thereto. Filed June 26, 1936. Term No. 138, O. T., 1936.